Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules to Establish New Personal Communications Services	)	GEN Docket No. 90-314
	)	RM-7140, RM-7175, RM-7618
	)	
	)	

To: The Commission

ORIGINAL

REPLY

Pacific Telecom Cellular, Inc. ("PTC"), by its attorneys, and pursuant to Section 1.106(h) of the Commission's rules, hereby replies to oppositions of MCI Telecommunications Corporation ("MCI") and General Communication, Inc. ("GCI") regarding PTC's Petition For Reconsideration ("Petition") in the above-captioned proceeding.[1/]

PTC's Petition addressed only one issue - the PCS eligibility limitation on entities with a 20 percent or greater ownership interest in a cellular system.[2/] PTC explained that the low, 20 percent threshold needlessly excludes companies who lack the ability to control a cellular system in the area where they desire to operate PCS facilities. PTC proposed that the Commission modify the rule

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1/ Second Report and Order, GEN Docket No. 90-314, 58 FR 59174, November 8, 1993 ("Second R&O"); Erratum, rel. November 22, 1993.

2/ See Section 99.204 of the Commission's rules.

and limit eligibility only for those parties who actually control a cellular system in the same area.

MCI, in its opposition, argues that the "...quarrels of the cellular carriers with the Commission's eligibility rules...are entirely without merit."[3/] MCI claims that the Commission properly rejected "control" as the test for eligibility restriction, and that the rules as adopted are rationally related to the Commission's public interest objectives.[4/]

GCI claims that "...the 20 percent standard...strikes a reasonable balance between allowing participation and preventing domination and...the 20 percent standard should not be increased significantly."[5/] GCI suggests that the 20 percent standard "...could be raised somewhat and remain reasonable", but GCI reserves comment on what might be a reasonable increase, stating that "...any large increase would tilt the balance too far away from preventing domination of the PCS market."[6/]

PTC is aware that the 20 percent ownership rule is intended by the Commission to represent a clear standard for

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[3/] MCI Opposition, p. 9.

[4/] MCI Opposition, p.10.

[5/] "Comments and Opposition of General Communication, Inc., on the Petitions for Reconsideration" ("GCI Opposition"), p.10.

[6/] GCI Opposition, p.10.

an eligibility limitation. Nevertheless, the sole purpose of the restriction cited by the Commission in adopting the rule was concern over "...the potential for unfair competition if cellular operators are allowed to operate PCS systems in areas where they provide cellular service."[7/] PTC submits that there is no more than a tenuous connection between ownership, which is frequently passive, and the ability of a cellular operator to lessen competition in the wireless marketplace. The Commission did not explain in the Second R&O why an ownership interest is, per se, contrary to the public interest and the basis on which to restrict eligibility. A rigid 20 percent ownership standard, however simple to understand by the public and to enforce by the Commission, bears little correlation to the goal of the Commission in attempting to forestall unfair competition among wireless service providers.

An eligibility restriction which is unnecessarily broad is contrary to the public interest because it needlessly reduces the number of prospective bidders for a license and thereby has the potential to reduce the pool of potential service providers, including the revenue to be derived from the competitive bidding process. An overly broad restriction also has the undesirable effect of excluding companies with a measure of experience in the wireless services market through ownership participation, and with business acumen required for

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[7/] Second R&O, para. 105.

new ventures. PTC submits that the Commission need not and should not deviate from its traditional reliance on control, including both de jure and de facto control, as the standard to identify which owner(s) of a cellular licensee have the ability to determine and carry out the company's policy decisions.

The control standard is well reasoned in FCC precedent and can ably serve as a bright line test for ineligibility. Because the control standard implements the Commission's policy more accurately than does the 20 percent standard, its adoption upon reconsideration is fully warranted.

Further, the Commission's policy on cellular eligibility must employ a least restrictive means analysis in recognition of First Amendment protections accorded to PCS licensees. The Commission, by defining PCS so broadly as to encompass the "widest possible range" of communications services to individuals and businesses, has opened the door for a PCS licensee to provide a service that is subject to protection under the First Amendment. [8/] For example, under the Commission's proposed PCS rules, a licensee could provide a service to subscribers such as subscription educational sessions produced by the licensee, or wireless access to periodicals published by the licensee. By exercising

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[8/] So long as they do not engage in "broadcasting" as defined by 47 U.S.C. § 153(0), PCS licensees are free to provide "any mobile communication service on their assigned spectrum." See 47 C.F.R. § 99.3.

"editorial discretion" over what type of information is conveyed over its system, the PCS licensee would engage in speech protectible under the First Amendment. See City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986).

Common carriers are obviously protected by the First Amendment when they seek to provide a communication service which involves a form of speech. E.g., C&P Telephone Co. of Virginia v. United States, 830 F.Supp. 909 (E.D. Va. 1993). A rule which would prospectively place restrictions on a carrier's ability to provide PCS, therefore, should be considered a "content-neutral regulation" that could infringe upon speech protected by the First Amendment. Section 99.204 of the proposed PCS rules is such a regulation, because it places restrictions on the ability of cellular licensees, or those affiliated with cellular licensees, from providing PCS in their cellular service area.

As a content-neutral regulation, proposed Section 99.204 would survive scrutiny under the First Amendment only if it passes the test first enunciated in United States v. O'Brien, 391 U.S. 367, 377 (1968). [9/] As the O'Brien test has been

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[9/] Section 22.904 should be subject to intermediate scrutiny under the O'Brien test, rather than the diminished review applied to broadcast regulation. In the first place, PCS is, by definition, not broadcasting. Secondly, the lower level of First Amendment protection afforded broadcasting was premised on the fact that there was a physical scarcity of electromagnetic frequencies available for (continued...)

refined, the rule must (1) be narrowly tailored to serve a significant government interest and (2) leave open ample alternative channels for communication. See Ward v. Rock Against Racism, 491 U.S. 781, 789 (1989).

PTC respectfully suggests that Section 99.204 cannot be upheld under the O'Brien test. There is absolutely nothing in the record to show that there is any significant government interest in prohibiting cellular licensees from providing PCS. Certainly, there is no factual basis for the assumption that the provision of PCS by cellular operators would have an anticompetitive effect. Nor has any showing been made that the Commission could not combat any such anticompetitive conduct through normal regulatory oversight.

[9/](...continued)
utilization by prospective broadcasters. The scarce spectrum justification allowed the Commission to place ownership restrictions on broadcasters in order to promote the public interest in the "diversification of the mass communications media". See, e.g., FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 799 (1978). In the case of PCS, the concept of spectrum scarcity is devalued by spread spectrum technology. Supporting technologies, including optical-fiber transmission capabilities, semi-conductor electronics, signal compression, and software-controlled digital signal processing yield an ever widening range of spectrum capacity. Because cellular operators do not now provide any form of mass communication, barring them from providing PCS in their service areas will hardly promote "diversification".

Conclusion

Any prohibition whatsoever on PCS eligibility should be the least restrictive means necessary to attain the desired result. Concern over the potential for unfair competition, the Commission's stated goal, can be addressed by a standard much less restrictive than a minority interest of 20 percent in a cellular operator serving 10 percent or more of the PCS market population. PTC urges the Commission to adopt control as the applicable standard because it avoids any needless exclusion of interested parties from the PCS licensing process.

Respectfully submitted

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January 13, 1994

CERTIFICATE OF SERVICE

I, Loren Bradon, a secretary in the law offices of Lukas, McGowan, Nace & Gutierrez, Chartered, hereby certify that I have on this 13th day of January 1994, sent via First Class U.S. Mail, a copy of the foregoing REPLY to the following persons:

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